

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December, 2020

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Annual Contracts; Discrimination; Favoritism; Professionalism and Interpersonal Communications; Retaliation
<u>CASE STYLE:</u>	<u>Radwan v. West Virginia University/Ruby Hospital</u> DOCKET NO. 2019-1570-WVU (12/2/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of evidence that his non-renewal was motivated in contravention of a substantial public policy.
<u>SUMMARY:</u>	Grievant was employed as a resident physician by WVU via annual contract and was not renewed. Grievant contends his non-renewal was in retaliation for protesting harassment and discrimination and that WVU engaged in discrimination/favoritism by not dismissing other residents for similar conduct. He further claims an invalid employment contract transformed non-renewal into a disciplinary dismissal. Grievant did not prove a right to continued employment or that his non-renewal was motivated by retaliation, discrimination, or in contravention of substantial public policy. Accordingly, this grievance is DENIED.

<u>KEYWORDS:</u>	Motion to Dismiss; Harassment; Relief; Moot
<u>CASE STYLE:</u>	<u>Porterfield v. Mountwest Community and Technical College</u> DOCKET NO. 2021-0285-MCTC (12/11/2020)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot.
<u>SUMMARY:</u>	Grievant filed this grievance alleging harassment and requesting termination or removal from position of the alleged harasser. Respondent moved to dismiss the grievance asserting Grievant had resigned from his position and that the grievance was untimely and had failed to state a claim upon which relief may be granted. As Grievant grieved only a condition of employment and has now resigned from his employment the grievance is moot. Accordingly, Respondent's motion to dismiss should be granted and this grievance dismissed.

KEYWORDS: Annual Contract; Renewal

CASE STYLE: Kasprowicz v. West Virginia University
DOCKET NO. 2020-0368-CONS (12/8/2020)

PRIMARY ISSUES: Whether Grievant met his burden of proof to show any entitlement or right to have his contract renewed.

SUMMARY: Grievant asserts that he was entitled to an extension of his employment as the Director of the Carruth Center for Psychological and Psychiatric Services at West Virginia University. Grievant was employed pursuant to an annual contract. Respondent asserts that Grievant had no right nor entitlement to a new annual contract and Respondent had no duty or responsibility to renew Grievant's annual contract. Grievant was unable to produce any evidence of any right or expectation of continued employment. Grievant did not meet his burden of proof to show any entitlement or right to have his contract renewed. In addition, the remedies requested by Grievant are beyond the authority of the Grievance Board to provide. This grievance is denied.

KEYWORDS: Termination; Unauthorize Leave; Return to Work; Family Medical Leave Act; Parental Leave Act; Job Abandonment

CASE STYLE: Green v. West Virginia University Institute of Technology
DOCKET NO. 2020-1513-WVUIT (12/9/2020)

PRIMARY ISSUES: Whether Respondent proved it was justified in terminating Grievant's employment for job abandonment.

SUMMARY: Grievant was employed by Respondent as a Campus Service Worker. Grievant took leave for the birth of her child. Grievant failed to provide required medical documentation, failed to communicate with Respondent, and failed to return to work following the expiration of her leave. Respondent terminated Grievant's employment for gross misconduct for job abandonment. Respondent proved it was justified in terminating Grievant's employment for job abandonment. Accordingly, the grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Experience Credit; Job Duties; Arbitrary and Capricious; English as a Second Language; ESL; IEP; LIEP; Special Education; Interpretation; Clearly Erroneous; Certified List; WVEIS
<u>CASE STYLE:</u>	<u>Holt v. Mercer County Board of Education</u> DOCKET NO. 2020-0169-MerED (12/17/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the decision to deny her the three-year experience credit granted to special education teachers by West Virginia Code § 18A-4-2(e) was clearly wrong or arbitrary and capricious.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a classroom teacher and teaches English as a Second Language. Grievant asserts that she as she performs the same job as special education teachers, and she is entitled to receive a pay increase designated by statute for special education teachers. Respondent denies Grievant's claims and asserts that Grievant is not entitled to the pay increase she seeks. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

<u>KEYWORDS:</u>	Motion to Dismiss; Advisory Opinion; Relief; Moot
<u>CASE STYLE:</u>	<u>Sprouse v. Gilmer County Board of Education</u> DOCKET NO. 2020-0886-GilED (12/29/2020)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot.
<u>SUMMARY:</u>	Grievant was employed by Respondent as an academic coach. Grievant alleges nepotism, favoritism, and discrimination and seeks Respondent "be directed to correct the biased personnel situation" and "be directed to follow WV Code and local policy." Grievant has now retired from employment. Respondent moved to dismiss the grievance as moot. As Grievant is retired, he is no longer subject to the conditions of employment he grieves. Grievant did not allege an economic injury that could be remedied. The grievance is moot. Accordingly, the grievance is dismissed.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Selection; Vacancy; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Smith v. Division of Highways</u> DOCKET NO. 2019-1777-DOT (12/8/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent's selection decision was arbitrary and capricious, or clearly wrong.
<u>SUMMARY:</u>	<p>Grievant protests his non promotion for a Crew Chief position by Respondent, Division of Highways. Grievant had in fact been selected, for a time, for the posted position, however, before his selection was completely processed, Grievant informed his supervisor that he did not want the position. The position was subsequently awarded to an alternate candidate. Grievant alleges Respondent's actions were unlawful, unreasonable, or arbitrary and capricious.</p> <p>Grievant maintains he is entitled to the promotion and requests he be granted the crew chief position. Respondent maintains its actions were reasonable and appropriate in the circumstances of this case. Grievant did not prove that the hiring decision regarding the successful applicant was arbitrary and capricious. Grievant did not establish by a preponderance of the evidence that Respondent acted unlawful, in not awarding him the Crew Chief position. This grievance is DENIED</p>

<u>KEYWORDS:</u>	Salary Increase; Classification; Job Duties; Promotion
<u>CASE STYLE:</u>	<u>Sizemore v. Division of Corrections and Rehabilitation/Central Office - DCR</u> DOCKET NO. 2019-1341-MAPS (12/4/2020)
<u>PRIMARY ISSUES:</u>	Whether Grievant is entitled to be paid the difference between the two classification during the time in question.
<u>SUMMARY:</u>	Grievant applied for a promotion from a Secretary 1 position to a Secretary 2 position with a 9.5% salary increase. Grievant began working in the Secretary 2 classification but her salary was not increased until a month after she assumed the position and performed the duties required in the higher classification. Respondent admits that a mistake was made causing Grievant to work in the higher classification for a month without the commensurate salary increase. Respondent admits that Grievant is owed the additional compensation she would have received if she had been paid at the proper rate when she began working as a Secretary 2.
<u>KEYWORDS:</u>	Classification; Reallocation; Work Assignments; Class Series; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Queen v. Department of Health and Human Resources/Bureau for Children and Families AND Division of Personnel</u> DOCKET NO. 2020-0460-DHHR (12/8/2020)
<u>PRIMARY ISSUES:</u>	Whether DOP acted in an arbitrary and capricious manner in determining Grievant's classification.
<u>SUMMARY:</u>	Grievant is employed by DHHR/BCF in a position classified as HR Associate. Grievant and DHHR/BCF contend that DOP should have classified Grievant's position as HR Generalist 2 based on her complex work assignments. In support thereof, they presented evidence that some of Grievant's work matches examples of work listed in the class specifications for HR Generalist 2. Grievant nevertheless failed to prove that DOP acted in an arbitrary and capricious manner in determining that the permanent predominant duties of Grievant's position were regular and routine, and lacking the complexity and type of work necessary to warrant reallocation to an HR Generalist 2. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Suspension; Misconduct; Policy

CASE STYLE: Post v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2019-1899-CONS (12/30/2020)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant.

SUMMARY: Grievant was employed at Sharpe Hospital as a Health Service Worker. Respondent met its burden of proof and demonstrated by preponderance of the evidence that Grievant was dismissed for good cause when he repeatedly violated hospital policy. Employees at Sharpe Hospital must follow policies, especially those related to patient safety. Respondent demonstrated that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the residents in question at Respondent's facility. This grievance is denied.

KEYWORDS: Motion to Dismiss; Moot; Relief

CASE STYLE: Daniel v. Department of Health and Human Resources/Hopemont Hospital
DOCKET NO. 2019-1535-DHHR (12/28/2020)

PRIMARY ISSUES: Whether this grievance should be dismissed as moot.

SUMMARY: Grievant filed a claim of a hostile work environment without specifying the relief she sought. Grievant revealed the relief she was seeking during her testimony. Respondent demonstrated that all specific relief Grievant was seeking was provided rendering this matter moot.
Following the hearing Respondent filed a Motion to Dismiss dated November 6, 2020. Grievant submitted a Response to the Motion to Dismiss dated November 9, 2020. The matter is now mature for a ruling on the motion.

KEYWORDS: Termination; Probationary Employee; Misconduct; Nazi Salute; Hitler Salute; Arbitrary and Capricious; Mitigation

CASE STYLE: Cole v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails
DOCKET NO. 2020-0823-MAPS (12/3/2020)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's probationary employment.

SUMMARY: Grievant was employed as a probationary employee by Respondent as a Correctional Officer I. While at the West Virginia Corrections Academy for training, Grievant and her classmates began saluting their training instructor, Sergeant Karrie Byrd, with the Nazi salute while saying "Hail Byrd!" Saluting Sgt. Byrd in that manner became the class's regular practice and they even did so for a group photograph prior to their graduation. This photograph was later posted to social media which drew nationwide attention and outrage. After it was confirmed that Grievant participated in the Nazi salute in the group photograph, Respondent dismissed her from employment for misconduct and for failing to report such behavior to her superiors. Grievant denies that she engaged in misconduct, asserting ignorance of the meaning of the salute and that she had no intent to make an offensive, hateful gesture. Grievant claimed that the gesture was only meant to be a "token" of respect for their instructor. Respondent proved that Grievant's participation in the Nazi salute was misconduct justifying her dismissal. Respondent failed to prove that Grievant's failure to report the class making the Nazi salute violated any DCR policy or regulation. Therefore, this grievance is DENIED.

KEYWORDS: Selection; Posting; Internal Applicants; Hiring Process; Seniority; Arbitrary and Capricious

CASE STYLE: Belcher, et al. v. Division of Highways
DOCKET NO. 2019-1195-CONS (12/18/2020)

PRIMARY ISSUES: Whether Grievants provided that Respondent violated W. Va. Code § 29-6-10 and the Division of Personal Administrative Rule which implements that statute by not giving proper consideration to their seniority in the selection process.

SUMMARY: Respondent posted a total of vacancies for five Transportation Worker 3 positions in two separate postings. The vacancies were for Mingo County. Respondent held a job fair in September 2018, wherein many external applicants were given an expedited application and interview process. One of the TW3 vacancies was filled by an external applicant at the job fair. Two more of the positions were filled by internal applicants and two vacancies were not filled. Neither Grievant was recommended nor selected for any of the vacant TW3 positions.

Grievant argue that the hiring process was improper, and their non-selection was arbitrary and capricious because they were the most qualified candidates. Both Grievants are experienced and capable employees with good employment records. However, they did not prove that any flaws that occurred in the hiring process effected the outcome. They also did not prove that the reasons for selecting the successful applicants were not reasonably related to the position positions being filled and therefore arbitrary and capricious.

KEYWORDS: Termination; Probationary Employee; Tardiness; Attendance Improvement Plan; Unsatisfactory Performance; Misconduct; Arbitrary and Capricious

CASE STYLE: Whetzel v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails AND
DOCKET NO. 2019-0663-MAPS (12/22/2020)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's probationary employment.

SUMMARY: Grievant was employed on a probationary basis as a Correctional Officer by the Division of Corrections and Rehabilitation (DCR). DCR terminated Grievant for misconduct, citing tardiness after placement on an Attendance Improvement Plan, negligence in allowing three inmates out of Administrative Segregation and into a cell where they sexually assaulted an inmate, untruthfulness during the ensuing investigation into the assault, failure to provide a doctor's note, and appropriation of a work radio. DCR proved its allegations of misconduct and that its dismissal of Grievant was not arbitrary and capricious. Accordingly, this grievance is DENIED.

KEYWORDS: Pay Increase; Policy; Job Posting

CASE STYLE: Sprankle v. Department of Health and Human Resources/Bureau for Children and Families AND
DOCKET NO. 2019-1442-CONS (12/8/2020)

PRIMARY ISSUES: Whether Grievant proved that Respondent violated any law, rule, or policy in only posting the job vacancy online or in failing to provide him with a 10% salary increase.

SUMMARY: Grievant is a Child Protective Services (CPS) Worker assigned to the CPS Crisis Team. Members of the team are sent to various areas of the state to assist with backlogs in CPS investigations. Grievant's office is in Berkeley County DHHR. Standard Operating Procedure (SOP) allows for a 10% salary increase for CPS staff in areas experiencing a CPS staffing crisis. Grievant contends he should receive the increase because Berkeley County is experiencing a staffing shortage of CPS workers. Respondent considers Charleston to be the home office for Crisis Team members but allows them to work in a DHHR facility close to home. In a separate grievance, Grievant claims he missed out on applying for a CPS Supervisor position when Respondent posted the vacancy online rather than in the building as required by State code. The Division of Personnel's Administrative Rule treats online postings as complying with code. Grievant did not prove that Respondent violated any law, rule, or policy in only posting the job vacancy online or in failing to provide him with a 10% salary increase. Accordingly, this grievance is DENIED.